DATE: December 7, 1989

TO: Ralph Shackelford, Purchasing Agent
FROM: City Attorney
SUBJECT: Local Preference

In your memorandum of November 2, 1989, you requested opinions on two questions.

Your first request was whether the City can legally limit the bidding on certain construction projects to local contractors and under what conditions that would be possible. The second question was whether the City could require a successful bidder to employ local labor for all or a portion of the trade work. Both questions can be answered together. This office has responded to similar questions in the past by means of a Report to Council dated November 17, 1981 and an Opinion dated April 18, 1983. In both those cases the answer to the request was negative.

The 1981 report was based on municipal corporations treatises and the United States Supreme Court case of Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), where a state was allowed to give its business to in-state sellers where it was merely participating in the market as a purchaser and not interfering with the natural functioning of the market. A general attempt to justify local preference as a proprietary and not governmental action would probably create unacceptable trade barriers.

The 1983 opinion of this office discussed the local preference question in light of the 1983 United States Supreme Court decision in White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983). That case upheld a mayor's executive order that required city residents hold one-half of the jobs on tax supported construction projects in the City of Boston. The Court held that as long as a city acts in its proprietary capacity, and not in its governmental capacity, it can discriminate against nonresidents of the city without violating the commerce clause of the United States Constitution.

This office responded that in spite of the Court's decision in White, the lowest responsible reliable bidder requirements of San Diego Charter section 94 would be difficult to meet if a bidder were disqualified on the basis of residence rather than lowest cost and reliability. In addition, a hire local plan would need to comply with the California Constitution as discussed in that opinion.

Since those opinions were written the United States Supreme

Court decided the case of United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208 (1984). That case involved a municipal ordinance requiring hiring preference for city residents, and the Court held that such an ordinance would fall within the purview of the privileges and immunities clause of the United States Constitution regardless of the fact that a municipality rather than a state had adopted the ordinance.

The Court found that the opportunity to seek employment with private employers engaged in public works projects is basic to the livelihood of the nation, and would fall under the privileges and immunities clause. The Court reiterated that the privileges and immunities clause "did not preclude discrimination against the citizens of other states where there is a 'substantial reason' for the difference in treatment," and whether the discriminatory law bears a close relation to those reasons. The language the Court used was quite specific in stating that nonresidents must "constitute a peculiar source of the evil at which the statute is aimed." Id at 222.

In order to limit bidding to local contractors or require a low bidder to employ local labor, the City would need to provide a substantial reason for such a directive and show that nonresidents were somehow a "source of evil" against whom protection need be provided. This requirement, in conjunction with those already mentioned, i.e., conformance to the California Constitution and Charter section 94, would make an acceptable hire-local ordinance extremely difficult if not impossible to draft.

JOHN W. WITT, City Attorney
By
Mary Kay Jackson
Deputy City Attorney

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